

APPEAL NO. 040468
FILED APRIL 22, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 26, 2004. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable back injury on _____; that the employer tendered a bona fide offer of employment (BFOE) effective June 10, 2003; that the BFOE remained in effect through June 30, 2003, after which date the terms of the offer exceeded the claimant's restrictions from his compensable injury; and that the claimant had disability beginning July 1, 2003, and continuing through the date of the CCH. The appellant (carrier) appealed the hearing officer's determinations. The claimant's response was untimely and was not considered.

DECISION

Affirmed.

Regarding the BFOE issue, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) sets out the requirements for a BFOE. On June 10, 2003, the claimant was tendered and he accepted a BFOE. The claimant performed the light duties stated in the BFOE until he was involuntarily terminated on June 30, 2003, for poor job performance and personality problems. The hearing officer found that by June 30, 2003, the actual job duties assigned to the claimant exceeded the restrictions set forth in the treating doctor's Work Status Report (TWCC-73), and that the claimant was unable to perform to the employer's satisfaction the light duties assigned because the job required activities which, in the TWCC-73, the treating doctor specifically restricted the claimant from doing. Rule 129.6(b) provides in relevant part that an employer may offer an employee a position that has restricted duties within the employee's work abilities as determined by the employee's treating doctor. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence on the BFOE issue, we conclude that the hearing officer's determination that the actual job duties assigned to the claimant exceeded the restrictions set forth in the treating doctor's TWCC-73 is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Although there is conflicting evidence on the disability issue, we conclude that the hearing officer's decision on that issue is supported by the claimant's testimony and by the reports of the treating doctor. The hearing officer's disability

determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **FEDERAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**PARKER W. RUSH
1445 ROSS AVENUE, SUITE 4200
DALLAS, TEXAS 75202.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Chris Cowan
Appeals Judge